

No. 105, ORIGINAL

In The
Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

and

UNITED STATES OF AMERICA,

Defendant-Intervenor.

ARTHUR L. LITTLEWORTH, Special Master

FIFTH AND FINAL REPORT

VOLUME II

PROPOSED JUDGMENT AND DECREE

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TABLE OF CONTENTS
VOLUME I

	Page
SECTION I	1
A. Introduction	1
B. Award of Damages.....	3
C. Results of the First Ten-Year Accounting...	3
D. Award of Costs	4
SECTION II	
HISTORY OF THE LITIGATION	5
A. Arkansas River Compact.....	5
B. Pleadings in the Action.....	8
C. The Liability Segment of the Trial.....	9
D. Quantifying the Shortage.....	11
E. Colorado's Compact Compliance Programs	12
F. Damages.....	16
G. Assuring Compact Compliance in the Future.....	20
SECTION III	
RESOLUTION OF ISSUES REMAINING AFTER THE COURT'S DECEMBER 7, 2004 OPINION. (543 U.S. 86)	22
A. Identification of Issues	22
B. Arbitration	23
C. Agreements	23
D. Issues Ruled Upon	25
E. Proposed Judgment and Decree.....	25

TABLE OF CONTENTS – Continued

	Page
SECTION IV	
RECOMMENDATIONS.....	26
APPENDIX EXHIBITS	
<i>Exhibit 1:</i>	
Order Following Status Conference of February 4, 2005, dated April 19, 2005.....	App. 1
<i>Exhibit 2:</i>	
States' Joint Proposed Schedule to Resolve Issues that Remain After the Supreme Court's Opinion, dated March 11, 2005.....	App. 8
<i>Exhibit 3:</i>	
Order Following Status Conference of September 30, 2005, dated October 3, 2005.....	App. 20
<i>Exhibit 4:</i>	
Order Re Possible Changes in Diversion Records Used for Calibration of the H-I Model, dated October 19, 2005	App. 71
<i>Exhibit 5:</i>	
Order Re Accumulation of Credits dated, November 15, 2005	App. 78
<i>Exhibit 6:</i>	
Order Regarding an Award of Costs, dated December 19, 2005	App. 86

TABLE OF CONTENTS – Continued

	Page
<i>Exhibit 7:</i>	
Additional Order Regarding an Award of Costs, dated April 17, 2006	App. 93
<i>Exhibit 8:</i>	
Order Re Decree Issues – Injunction, dated January 3, 2006	App. 101
<i>Exhibit 9:</i>	
Order Re Certain Non-Appendix Decree Issues, dated January 25, 2007	App. 106
<i>Exhibit 10:</i>	
Order Re Schedule for Providing Data and Model Runs in Appendix A and Appendix B to Decree, dated February 6, 2007	App. 112
<i>Exhibit 11:</i>	
Order Re Date for Making Up Shortfall, Appendix A, Section 3A, dated February 7, 2007	App. 115
<i>Exhibit 12:</i>	
Order Re Delivery of Replacement and Shortfall Water, and Related Matters, dated February 16, 2007	App. 121
<i>Exhibit 13:</i>	
Order Re Amity Canal's Interception of Fort Lyon Canal Return Flows, dated March 30, 2007	App. 127

TABLE OF CONTENTS – Continued

	Page
<i>Exhibit 14:</i>	
Order Re Termination of Offset Account, dated April 10, 2007	App. 132
<i>Exhibit 15:</i>	
Order Re Limit on Usable Flow for Ground- water Recharge, dated June 20, 2007	App. 136
<i>Exhibit 16:</i>	
Order Re Standard for Recalibration of the H-I Model, dated June 26, 2007	App. 138
<i>Exhibit 17:</i>	
Order Re Classification of New Replacement Sources Requiring Model Code Changes, dated June 26, 2007	App. 142
<i>Exhibit 18:</i>	
Amendment to Order of June 26, 2007 Re Classification of New Replacement Sources, dated August 27, 2007	App. 144
<i>Exhibit 19:</i>	
Order Re Treatment of Native Water Stored as Fryingpan-Arkansas Project Water, dated October 10, 2007	App. 146

TABLE OF CONTENTS – Continued

	Page
VOLUME II	
PROPOSED JUDGMENT AND DECREE	1
I. Injunction	2
II. Dispute Resolution	5
III. Modification of Appendices to the Decree	6
IV. Retention of Jurisdiction	6
V. Definitions	8
VI. List of Appendices to the Decree	11
APPENDICES TO JUDGMENT AND DECREE	
A. Compliance and Repayment	
A.1. Compact Compliance and Re- payment Accounting Procedures	A.1
A.2. Agreement for an Approved Procedure for Determining Re- placement Requirements for Re- placement Plans to Demonstrate Available Supplies for Current Year Well Pumping and Shortfall Makeup	A.13
A.3. Agreement Re Substitute Water Supply Plans and Colorado Wa- ter Court Decrees for Post-1985 Depletions	A.22
A.4. Agreement Not to Terminate the Offset Account Resolution for a Specified Period and Related Matters	A.35

TABLE OF CONTENTS – Continued

	Page
B. H-I Model Updates and Changes	
B.1. Procedures for Annual Updates, Calculation of Depletions and Accretions, Changes to the H-I Model, Reporting, Inspection, and Evaluation of the Colorado Use Rules	B.1
B.2. Agreement on Potential Evapotranspiration as Used in the H-I Model	B.30
B.3. Administration of Parcels Claimed for Augmentation Credit Agreement	B.34
B.4. Irrigated Acreage Updating Agreement.....	B.52
B.5. Sisson-Stubbs Agreement.....	B.55
B.6. Outliers Agreement	B.58
B.7. Agreement Re Amended Observed Diversion Records	B.60
B.8. Agreement Re Recalibration of the H-I Model.....	B.62
C. See Volume III	
D. Limitation on Accumulation of Credits Agreement.....	D.1
E. Ten-Year Accounting of Depletions and Accretions to Usable Stateline Flow, 1997-2006	E.1

TABLE OF CONTENTS – Continued

	Page
F. Offset Account Delivery Crediting	
F.1. Stipulation Re Offset Account in John Martin Reservoir	F.1
F.2. Agreement Concerning the Offset Account in John Martin Reservoir for Colorado Pumping, Determination of Credits for Delivery of Water Released for Colorado Pumping, and Related Matters.....	F.9
G. Acceptable Sources of Water	
G.1. General Principles	G.1
G.2. Agreement Re Condition of Approval for Replacement Plans Using Water Withdrawn From the Dakota and/or Cheyenne Aquifers.....	G.5
H. Dispute Resolution Procedure	
I. Colorado Measurement Rules	
I.1. Amended Rules Governing the Measurement of Tributary Groundwater Diversions Located in the Arkansas River Basin, revised November 30, 2005	I.1
I.2. Agreement Re Amending the Measurement Rules Regarding the Use of Power Conversion Coefficients (PCCs) to Determine Groundwater Pumping.....	I.13

TABLE OF CONTENTS – Continued

	Page
J. Colorado Use Rules and Special Rules	
J.1. Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the Arkansas River Basin, Colorado (with map).....	J.1
J.2. Additional Requirements for Post- 1985 Uses	J.26
K. Arkansas River Compact.....	K.1
L. Resolution Concerning an Offset Account in John Martin Reservoir for Colorado Pumping, as Amended March 30, 1998	L.1
M. Map of Arkansas River Basin.....	M.1

VOLUME III

C. H-I Model Documentation (w/DVD) and Usable Flow Methodology	
C.1 Hydrologic-Institutional Model: Model Documentation	C.1
C.2 Usable Flow Methodology	C.209

No. 105, Original

**IN THE SUPREME COURT
OF THE UNITED STATES**

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

and

UNITED STATES OF AMERICA,

Defendant-Intervenor.

JUDGMENT AND DECREE

This Judgment and Decree is based on the Opinions of the Court in this case and the recommendations of Special Master Arthur L. Littleworth as approved by the Court. See *Kansas v. Colorado*, 514 U.S. 673 (1995); 533 U.S. 1 (2001); 543 U.S. 86 (2004); First Report (1994); Second Report (1997); Third Report (2000); Fourth Report (2003); and Fifth and Final Report (2008).

JUDGMENT

Judgment is awarded against the State of Colorado in favor of the State of Kansas for violations of the Arkansas River Compact resulting from postcompact well pumping in Colorado. Judgment is awarded in the amount of \$34,615,146.00 for damages and prejudgment interest, including the required adjustment for inflation, arising from depletions of usable streamflow of the Arkansas River at the Colorado-Kansas Stateline in the amount of 428,005 acre-feet of water during the period 1950-1996. The damages were paid in full on April 29, 2005. Costs through January 31, 2006, including reallocation of Kansas' share of the Special Master's fees and expenses, are awarded to Kansas in the amount of \$1,109,946.73. These costs were paid in full on June 29, 2006. By Stipulation, \$100,000.00 of the Special Master's fees and expenses are reallocated from the United States to Kansas.

Kansas' claims regarding the Winter Water Storage Program and the operation of Trinidad Reservoir and all Colorado Counterclaims are hereby dismissed.

DECREE

I. Injunction

A. General Provisions

1. It is Ordered, Adjudged, and Decreed that the State of Colorado, its officers, attorneys,

agents, and employees are hereby enjoined to comply with Article IV-D of the Arkansas River Compact by not materially depleting the waters of the Arkansas River, as defined in Article III of the Compact, in usable quantity or availability for use to the water users in Kansas under the Compact by Groundwater Pumping, as prescribed in this Decree, and more particularly:

- a. To prevent Groundwater Pumping in excess of the precompact pumping allowance of 15,000 acre-feet per year without Replacement of depletions to Usable Stateline Flow in accordance with this Decree;
 - b. To enforce the Colorado Use Rules with respect to Groundwater Pumping, unless John Martin Reservoir is spilling and Stateline water is passing Garden City, Kansas; and
 - c. To enforce the Colorado Measurement Rules with respect to Groundwater Pumping.
2. Compliance with this Decree shall constitute Compact compliance with respect to Groundwater Pumping.
- B. Determination of Compact Compliance With Respect to Groundwater Pumping
1. Compact compliance with respect to Groundwater Pumping shall be determined using the results of the H-I Model over a moving

ten-year period beginning with 1997, in accordance with the Compact Compliance Procedures described in Appendix A. Any Shortfall shall be made up by Colorado as specified in Section I.C of this Decree.

2. Annual Calculations of depletions and accretions to Usable Stateline Flow shall be determined using the H-I Model, in accordance with the procedures described in Appendix B and the Durbin usable flow method with the Larson coefficients, which is documented in Appendix C. Annual Calculations shall be done on a calendar year basis unless the States agree to a different year for the calculations. Accumulation of accretions shall be limited as described in Appendix D. The Annual Calculations for each of the years 1997-2006, found in Appendix E, are final, except as set forth in Section III of this Decree. Similarly, the results of Annual Calculations for years after 2006 shall be final for use in the ten-year Compact compliance accounting, when determined as provided in Appendices A and B, subject to the same provisos applicable to the 1997-2006 Annual Calculations.
3. Colorado shall be entitled to credit for Replacement of depletions to Usable Stateline Flow. The credit for Replacement shall be determined using the H-I Model, except for credit derived from operation of the Offset Account, which shall be determined as set out in Appendix F, and except for credit for direct deliveries of water to the Stateline if

the Offset Account does not exist, which shall be determined as set out in Appendix A.

4. The H-I Model may be improved by agreement of the States or pursuant to the Dispute Resolution Procedure contained in Appendix H.

C. Repayment of Shortfalls

1. If there is a Shortfall, Colorado shall make up the Shortfall in accordance with the provisions of Appendix A.
2. Colorado shall make up a Shortfall by delivering water to the Offset Account in John Martin Reservoir to the extent that space is available. To the extent that space is not initially available in the Offset Account, Colorado shall make up the rest of such Shortfall by delivering water to the Offset Account as space becomes available. The timing, accounting, crediting, notice, and other matters related to deliveries of water to make up a Shortfall shall be accomplished pursuant to Appendix A.

II. Dispute Resolution

The States shall work together informally to the maximum extent possible to resolve any disagreements regarding implementation of this Decree. Disagreements that cannot be so resolved shall be submitted to the stipulated Dispute Resolution Procedure contained in Appendix H.

III. Modification of Appendices to the Decree

Appendices A-J may be modified only: (a) by agreement of the States or (b) pursuant to the Dispute Resolution Procedure, *provided* that the Colorado Measurement Rules and Colorado Use Rules may be amended by Colorado to the extent that Colorado can demonstrate that any such amendments will adequately protect Kansas' rights under the Compact, and *further provided* that Appendix E shall not be modified except that it shall be subject to later determinations of Replacement credits to be applied toward Colorado's Compact obligations by the Colorado Division 2 Water Court and any appeals therefrom, and further subject to the right of Kansas to seek relief from such Colorado Water Court determinations under the Court's original jurisdiction. Disputes arising under this Section III shall be subject to the Dispute Resolution Procedure.

IV. Retention of Jurisdiction

A. The Court retains jurisdiction for a limited period of time after the end of the initial ten-year startup period (ending in 2006) for the purpose of evaluating the sufficiency of the Colorado Use Rules and their administration and whether changes to this Decree are needed to ensure Compact compliance. The procedures to be followed are set out in Appendix B.1, Part VII.

B. The retained jurisdiction provided in Section IV.A of this Decree shall terminate at the end of 2008, unless, prior to December 31, 2008, either State has notified the Special Master that there is a dispute concerning the sufficiency or administration of the Use Rules that has been submitted to the Dispute Resolution Procedure. If either State notifies the Special Master as provided herein, the retained jurisdiction shall continue, and the States, within 60 days from the conclusion of the Dispute Resolution Procedure, shall request either further proceedings before the Special Master or termination of the retained jurisdiction provided for in Section IV.A of this Decree. The Special Master shall recommend to the Court such action as he deems appropriate. The Special Master shall be discharged upon termination of the retained jurisdiction provided for in Section IV.A of this Decree.

C. Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the Decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

D. No application for relief under the retained jurisdiction in this Section IV shall be accepted unless the dispute has first been submitted to the Dispute Resolution Procedure.

V. Definitions

Whenever used in this Judgment and Decree, including Appendices, terms defined in the Compact shall have the meaning ascribed to them in the Compact; in addition, the following terms shall mean:

Acre-foot: The volume of water required to cover one acre of land to a depth of one foot, which is equal to 325,851 gallons;

Annual Calculations: The calculation for each year of depletions and accretions to Usable Stateline Flow using the H-I Model, as described in Appendix B;

Appendix: One of the Appendices listed in Section VI of this Decree and included in Volumes II and III of the Special Master's Fifth and Final Report in this case;

Acceptable Sources of Water: As defined in Appendix G;

ARCA: The Arkansas River Compact Administration created by Article VIII of the Compact;

Colorado Measurement Rules: Amended Rules Governing the Measurement of Tributary Ground Water Diversions Located in the Arkansas River Basin, revised November 30, 2005, contained in Appendix I.1, as they may be amended from time to time in accordance with Article III of this Decree;

Colorado Use Rules: Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the Arkansas River Basin,

Colorado, Kan. Exh. 1123, contained in Appendix J.1, as they may be amended from time to time in accordance with Article III of this Decree;

Compact: The Arkansas River Compact, 63 Stat. 145 (1949); Kan. Stat. Ann. § 82a-520; Colo. Rev. Stat. § 37-69-101;

Dispute Resolution Procedure: As set out in Appendix H;

Groundwater Pumping: Pumping of water from wells (other than the Wiley/Sapp Wells) in excess of 50 gallons per minute, from the alluvial and surficial aquifers along the mainstem of the Arkansas River between Pueblo, Colorado, and the Stateline within the domain of the H-I Model described in Appendix C.1;

H-I Model: The Hydrologic-Institutional Model as described and documented in Appendix C.1;

John Martin Reservoir: The reservoir constructed and operated by the United States Army Corps of Engineers on the mainstem of the Arkansas River approximately 58 miles upstream from the Stateline, as referred to in the Compact;

Offset Account: The storage account established in John Martin Reservoir and operated in accordance with the ARCA Resolution Concerning an Offset Account in John Martin Reservoir for Colorado Pumping, dated March 17, 1997, as amended twice on March 30, 1998, and contained in Appendix L, as the same may be further amended by the ARCA;

Replacement: Delivery of water from Acceptable Sources of Water to prevent depletions caused by Groundwater Pumping;

Shortfall: A net depletion to Usable Stateline Flow based on the results of the H-I Model over a ten-year period using the Compact Compliance Accounting Procedures described in Appendix A;

Usable Stateline Flow: Stateline flow as simulated by the H-I Model and determined to be usable pursuant to the Durbin usable flow method with the Larson coefficients, as set out in Appendix C.2; and

Wiley/Sapp Wells: Wells decreed as alternate points of diversion for precompact surface water rights in Colorado by the District Court, Water Div. 2, State of Colorado, Case Nos. 82CW115 (W-4496), 82CW125 (W-4497), and 89CW82; see App. to Third Report of the Special Master 59-61.

VI. List of Appendices to The Decree
[Printed in Volumes II and III of the
Special Master's Fifth and Final Report]¹

- A. Compliance and Repayment
 - 1. Compact Compliance and Repayment Accounting Procedures
 - 2. Agreement for an Approved Procedure for Determining Replacement Requirements for Replacement Plans to Demonstrate Available Supplies for Current Year Well Pumping and Shortfall Makeup
 - 3. Agreement Re Substitute Water Supply Plans and Colorado Water Court Decrees for Post-1985 Depletions
 - 4. Agreement Not to Terminate the Offset Account Resolution for a Specified Period and Related Matters
- B. H-I Model Updates and Changes
 - 1. Procedures for Annual Updates, Calculation of Depletions and Accretions, Changes to the H-I Model, Reporting, Inspection, and Evaluation of the Colorado Use Rules

¹ The Appendices are incorporated in this Judgment and Decree as if fully set forth herein; if a prior agreement, stipulation, compact, resolution, or rule included in an Appendix should differ from the original document, the original document shall control.

2. Agreement on Potential Evapotranspiration as Used in the H-I Model
3. Administration of Parcels Claimed for Augmentation Credit Agreement
4. Irrigated Acreage Updating Agreement
5. Sisson-Stubbs Agreement
6. Outliers Agreement
7. Agreement Re Amended Observed Diversion Records
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 - 2. Agreement Re Condition of Approval for Replacement Plans Using Water Withdrawn From the Dakota and/or Cheyenne Aquifers
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- M. Map of Arkansas River Basin